

Kahler v. Kansas: Ask the Wrong Question, You Get the Wrong Answer

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I. *KAHLER V. KANSAS*:¹ SETTING THE STAGE

In January 2009, Karen Kahler filed for divorce from her husband, James. Over the next ten months, James became increasingly angry, assaulted Karen once (pleading guilty to the crime), and regularly stalked her. Finally, on November 28, 2009, James, armed with a high-powered rifle, drove nearly an hour from his parent's home where he was temporarily living to the home of Karen's grandmother, where she was staying with their son and two daughters. There, James broke in and shot to death Karen, their daughters, and Karen's grandmother. James allowed his son to flee.² The grandmother's Life Alert system recorded some of the shootings and recorded James saying, "Oh shit! I am going to kill her . . . G-d damn it!"³

James Kahler was charged with capital murder. His examining psychiatrist determined that Kahler suffered from "severe major depression and obsessive-compulsive/narcissistic personality deterioration."⁴ The State's mental health expert largely agreed with this diagnosis.⁵ The defense's expert also asserted that at the time of the shootings, Kahler's depression was so severe that he "did not make a genuine choice to kill his family members." Instead, he "'felt compelled and . . . basically for . . . at least that short period of time completely lost control' of his faculties."⁶

Unfortunately for Kahler, who wished to assert an insanity defense, Kansas abolished the defense in 1995, adopting instead the so-called "*mens rea* approach" to mental illness. By statute, it is "a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental

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¹ 140 S. Ct. 1021 (2020).

² Brief for Respondent at 3–5, *Kahler v. Kansas*, 140 S. Ct. 1021 (2020) [hereinafter Respondent's Brief] (No. 18-6135).

³ Brief for Petitioner at 10, *Kahler v. Kansas*, 140 S. Ct. 1021 (2020) [hereinafter Petitioner's Brief] (No. 18-6135).

⁴ *Id.* at *9 (quoting the trial transcript).

⁵ *Id.* at *10–11.

⁶ *Id.* at *11 (quoting the trial transcript).

state required as an element of the crime charged. Mental disease or defect is not otherwise a defense.”⁷ That provision, however, was of no value to Kahler, because whatever mental health issues he experienced when he went on his killing rampage, they did not disprove that he intended to kill his family. Indeed, the Life Alert recording helped prove his intent. Thus, all of the elements of capital murder were provable and proven. Without an insanity defense available, Kahler was easily convicted.

Under Kansas law, Kahler is also entitled to introduce mental health evidence at the sentencing phase to mitigate his punishment based on proof that “[t]he capacity of the defendant to appreciate the criminality of the defendant’s conduct or to conform the defendant’s conduct to the requirement of law was substantially impaired.”⁸ Kansas law also authorizes a judge to commit a convicted defendant to a mental health facility rather than prison if “the defendant is in need of psychiatric care,” “such treatment may materially aid in the defendant’s rehabilitation,” and if “the defendant and society are not likely to be endangered” by permitting the defendant to receive psychiatric care in lieu of imprisonment.⁹ Nonetheless, Kahler was sentenced to death.

Kahler appealed his conviction to the Kansas Supreme Court, contending in part that Kansas’s abolition of the insanity defense violated the United States Constitution. The state court affirmed his conviction and death sentence.¹⁰ Kahler petitioned the United States Supreme Court, which granted certiorari on March 18, 2019.

A year later, the Supreme Court, by a 6-3 vote, in an opinion authored by Justice Elena Kagan, held that Kansas’s statutory scheme did not violate the Due Process Clause.¹¹ Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor, dissented.

Was the Supreme Court’s ruling predictable? Yes, although the Court reached the predictable outcome in a particularly odd way. It does not say that abolition of the insanity defense is constitutional, but rather that, because Kansas permits a defendant to introduce mental illness evidence to negate the *mens rea* element of an offense and at sentencing to mitigate punishment, “Kansas’s scheme does not abolish the insanity defense.”¹²

Was the ruling correct as a matter of constitutional law? Although it is a close issue, I am satisfied that Justice Breyer’s dissent offers the better constitutional analysis.

⁷ KAN. STAT. ANN. § 22-3230 (2009).

⁸ KAN. STAT. ANN. § 21-6625(a)(6) (2011).

⁹ KAN. STAT. ANN. § 22-3430 (2014).

¹⁰ *State v. Kahler*, 410 P.3d 105 (Kan. 2018).

¹¹ *Kahler v. Kansas*, 140 S. Ct. 1021, 1025 (2020).

¹² *Id.* at 1031, n.6.

Constitutional issues aside, is abolition of the insanity defense wise public policy? No, and this is *not* a close issue. Indeed, even some justices in the majority opinion may doubt the wisdom of the Kansas approach.¹³

Finally, is there a single, overall thesis to this essay? No, but the most important one is this: when you ask the wrong question, you get the wrong answer. *Kahler v. Kansas* proves this point. More on this as we proceed.

II. SOME PRELIMINARY OBSERVATIONS

A. *The Court's Historic Hesitation to Intervene*

The Supreme Court's ruling that Kansas's statutory scheme did not violate the Due Process Clause did not surprise me. Indeed, my Criminal Law students from last year may remember that I predicted that the Court would vote 7-2 against *Kahler*. My error was in believing that Justice Breyer would vote with the majority rather than write the dissenting position.

My prediction that Kansas would prevail required no real prescience. I expect that nearly all criminal law specialists expected this outcome. One of my students asked me after class whether I thought the outcome would have been different had this issue arisen earlier, for example, during the activist Warren Court's so-called "criminal procedure revolution." I told her, "No."

How did the Warren Court deal with substantive criminal law? If one thinks about it, nobody talks about the "Warren Court's *substantive criminal law* revolution" because it never happened. Even though the Court stated in 1952 that the doctrine of "*mens rea*" is not a "provincial or transient notion," and that "[i]t is as universal and persistent in mature systems of law as belief in freedom of the human will,"¹⁴ the Warren Court never held that strict liability crimes—punishment in the absence of culpability—are *per se* unconstitutional.¹⁵ The Warren Court blinked.

And, as I have written elsewhere,¹⁶ when the Warren Court *did* put a constitutional toe in the water and intervene in the area of substantive criminal law, it typically backed away quickly. For example, in *Lambert v. California*,¹⁷ the Court

¹³ *Id.* at n.7 ("The dissent . . . considers Kansas's view benighted (*as maybe some in the majority do too*).") (emphasis added).

¹⁴ *Morissette v. United States*, 342 U.S. 246, 250 (1952).

¹⁵ Professor Herbert Packer wryly observed that "[m]ens rea is an important requirement, but it is not a constitutional requirement, except sometimes." Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107.

¹⁶ Joshua Dressler, *Reflections on the Warren Court's Criminal Justice Legacy, Fifty Years Later: What the Wings of a Butterfly and a Yiddish Proverb Teach Me*, 51 U. PAC. L. REV. 727, 737–39 (2020).

¹⁷ 355 U.S. 225 (1957).

held that under very limited circumstances it violates the Due Process Clause to convict a person for violating a law (actually, here, a city ordinance) of which he was unaware, notwithstanding the common law doctrine that ignorance of the law is not an excuse. Justice Felix Frankfurter was correct, however, when he observed in his dissent that “the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law.”¹⁸

Similarly, there is the Warren Court’s toe-in-the-water approach to the Eighth Amendment. In *Robinson v. California*,¹⁹ the Warren Court declared unconstitutional a California statute that made it a criminal offense to “be addicted to the use of narcotics.” The Court said that “[e]ven one day in prison”²⁰ constituted cruel and unusual punishment for being “guilty” of possessing the diseased status of being a drug addict. The logical extension of this ruling, as Justice White observed in his dissent, was that if it is unconstitutional to convict a person for being an addict, “it is difficult to understand why it would be any less offensive . . . to convict him for use” of narcotics.²¹ But, oops, just five years later, in *Powell v. Texas*,²² the Warren Court rejected the logic of *Robinson* and held that even if a person suffers from the disease of alcoholism, it does not violate the Constitution to make it an offense to “be found in a state of intoxication in a public place.” What is significant here is that, writing for the Court, Justice Marshall—Justice Marshall!—candidly observed that if *Robinson* was interpreted as most observers (including Justice White) understood it, “it is difficult to see any limiting principle that would serve to prevent this Court from becoming . . . the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.”²³ “Ultimate arbiter” of substantive criminal law doctrine was a role even the activist Warren Court was unwilling to play.

So, if the Warren Court was extremely hesitant to “invade” the legislative province, it was inevitable that today’s more conservative Supreme Court would be disinclined to tell Kansas what excuse defenses it must recognize. Thus, the outcome in *Kahler*, if not its reasoning, was virtually preordained.

B. *A Bad Case to Make the Case for Insanity*

For those who wanted the Supreme Court to write an eloquent defense of the insanity defense despite the Court’s general reluctance to intervene in such cases, *Kahler v. Kansas* was a particularly unappealing one to bring to the Court. First, the

¹⁸ *Id.* at 232.

¹⁹ 370 U.S. 660 (1962).

²⁰ *Id.* at 667.

²¹ *Id.* at 688.

²² 392 U.S. 514 (1968).

²³ *Id.* at 533.

facts are awful. Four defenseless persons were killed, including two children. And the facts do not seem all that abnormal: an angry husband, an estranged wife; a bitter divorce process including child custody fights; then, violence. We unhappily hear about these situations all of the time. Insanity? Really? There was nothing bizarre about the facts. Moreover, Kahler had no history of psychiatric care before the shooting. It just sounds like another man with anger management problems.

This was not like the tragic and bizarre case of Andrea Yates,²⁴ who had a long history of mental illness and civil commitment before she drowned her four beloved little children in the bathtub in order to save them from the Devil. Longshot or not, if you are going to argue that the Constitution demands that a state permit a mentally disturbed person to plead insanity, advocates for the defense would surely have preferred Andrea Yates rather than James Kahler to assert the claim.

There is more. The question presented to the Court in the Petitioner's brief was "Do the Eighth²⁵ and Fourteenth Amendments permit a state to abolish the insanity defense?" In the brief, however, counsel argued exclusively for one version of the insanity test, specifically, the *M'Naghten* test.²⁶ Thus, the brief states, "[a] mentally ill person who commits a harmful act with no rational appreciation that it is [morally] wrong lacks the essential prerequisite for criminal punishment."²⁷

This exclusive focus on *M'Naghten* is understandable because that was the test applied in Kansas before abolition and because *M'Naghten* was the dominant common law test. That means, however, that Kahler's counsel was asking the Supreme Court not only to declare that the Constitution requires a State to recognize an insanity defense, but also to require Kansas to apply a specific definition of insanity, rather than to assert that there constitutionally must be an insanity defense, an old version or a new one, but it is up to the State of Kansas to decide which one it will be.

Finally, to make this case particularly unappealing, at least on the basis of the evidence introduced, James Kahler likely was *not* insane under the *M'Naghten* test. The closest the defense expert came to making a case for insanity was when he reported that Kahler "felt compelled" to kill.²⁸ That sounds like a volitional incapacity claim, not a cognitive one. And, since Kahler purposely spared his son—who wanted to spend more time with his father²⁹—this fact makes even a volitional argument suspect.

²⁴ Yates v. State, 171 S.W.3d 215 (Tex. App. 2005).

²⁵ The Court did not reach the Eighth Amendment issue because Kahler had failed to raise it in the Kansas courts. Kahler v. Kansas, 140 S. Ct. 1021, 1027, n.4 (2020).

²⁶ M'Naghten's Case (1843) 8 Eng. Rep. 718 (1843).

²⁷ Petitioner's Brief, *supra* note 3, at *12.

²⁸ See Petitioner's Brief *supra* note 6 and accompanying text.

²⁹ Respondent's Brief, *supra* note 2, at *5.

III. THE OPINION (AND MY CRITICAL OBSERVATIONS ALONG THE WAY)

As I have noted, the issue in the case as initially set out in petitioner Kahler's brief was whether the Due Process Clause³⁰ permits a state to abolish the insanity defense. Justice Kagan, writing for the six-justice majority, stated the issue more narrowly: "The issue here is whether the Constitution's Due Process Clause . . . compels the acquittal of any defendant who, because of mental illness, could not tell right from wrong when committing his crime."³¹ Elsewhere, Kagan writes that "[w]e . . . decline to require that Kansas adopt an insanity test turning on a defendant's ability to recognize that his crime was morally wrong."³² In other words, the issue the Court majority claimed to be deciding was whether Kansas was compelled by the Due Process Clause to apply a specific definition of insanity.

With the issue thus narrowed, Justice Kagan stated that "[w]ithin broad limits . . . 'doctrine[s] of criminal responsibility' must remain 'the province of the States.'"³³ They are "a project for state governance, not constitutional law."³⁴ Anyone who seeks to use the Due Process Clause as a basis for compelling a legislature to adopt a particular rule of criminal liability "must surmount a high bar."³⁵

The high bar that a petitioner must surmount to prove that a state has violated the Due Process Clause is to show that its approach "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"³⁶ And, in applying *that* test, the "primary guide" is "'historical practice' And in assessing that practice, we look primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions."³⁷ As Kagan put it, the ultimate "question is whether a rule of criminal responsibility is so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing

³⁰ See Kahler *supra* note 25.

³¹ Kahler, 140 S. Ct. at 1024–25.

³² *Id.* at 1037.

³³ *Id.* at 1028 (quoting *Powell v. Texas*, 392 U.S. 514, 534, 536 (1968) (plurality opinion)).

³⁴ *Id.* at 1037.

³⁵ *Id.* at 1027.

³⁶ *Id.* (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952)).

³⁷ *Id.* (quoting, in part, *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion)).

another.”³⁸ Or, “said just a bit differently,” the issue here is whether the Due Process Clause “imposes no single canonical formulation of legal insanity.”³⁹

This way of expressing the issue was critical. Rather than asking whether the Constitution permits a state to impose criminal punishment on mentally ill persons who are not responsible for their actions—the proper question—the court asked, and then answered, the wrong question of whether a *particular rule* of criminal responsibility—specifically, whether a person must be excused if, due to mental illness, he is unable to recognize that his conduct was morally wrong—is “so old and venerable” that a State is not permitted to choose a different responsibility rule. Although Kahler originally expressed the issue in general terms of whether Kansas was compelled to recognize *an* insanity defense, the Court (concededly with the help of Kahler’s brief⁴⁰) treated the issue more narrowly. Lesson: you ask the wrong question, you get the wrong answer.

Having said this—and *one should not lose sight of this*—the majority concedes that “Kahler is right that for hundreds of years jurists and judges have recognized insanity (however defined) as relieving responsibility for a crime.”⁴¹ This is a critical admission. In other words, *an* insanity excuse is “old and venerable” and “entrenched” in the central values of our legal system. It *has* been the case for centuries that those who are not responsible for their actions due to mental illness *are* exempt from punishment. By narrowing the question, however, to whether a specific definition of insanity is entrenched, Justice Kagan was able to shift the focus and use much of the majority opinion to demonstrate that early common law commentators and courts proposed various versions of the insanity defense, some focusing on whether the mentally ill actor thought his particular act was moral, others considering whether the mentally ill actor thought the particular act was illegal, and still others looking at whether the actor “had the ability to do much thinking at all.”⁴²

Significantly, Justice Kagan made this additional (and I will argue, erroneous) point in the opinion: “Early commentators on the common law proposed various formulations of the insanity defense, with some favoring a morality inquiry and others a *mens rea* approach.”⁴³ She points to early opinions in which “moral incapacity was a byproduct of the kind of cognitive breakdown that precluded finding *mens rea*, rather than a self-sufficient test of insanity.”⁴⁴ In other words,

³⁸ *Id.* at 1028.

³⁹ *Id.* at 1029 (quoting *Clark v. Arizona*, 548 U.S. 735, 753 (2006)).

⁴⁰ See Petitioner’s Brief *supra* note 27 and accompanying text.

⁴¹ *Kahler*, 140 S. Ct. at 1030.

⁴² *Id.* at 1033.

⁴³ *Id.* at 1032.

⁴⁴ *Id.* at 1034.

Kagan was saying that Kansas's statutory system, which permits a defendant to introduce mental health evidence to disprove the *mens rea* element of a crime (here, Kahler's intent to kill), is consistent with one common law version of the insanity defense.

This historical analysis is wrong or, at least, overstated. The Court is attaching a modern understanding of "*mens rea*" to the term rather than the one used centuries ago by the scholars it quotes. In early years, the term "*mens rea*" simply meant that an actor committed the offense with a "morally blameworthy state of mind." *Mens rea*, in this sense, meant that the defendant was morally culpable in committing the crime. Thus, to use a different excuse to make the same point, a person coerced to commit a crime because of a threat of imminent death is often said to lack "*mens rea*" in the sense that she was not blameworthy even though she intentionally committed the harmful act.⁴⁵ In modern times, particularly since the advent of the Model Penal Code, however, the term "*mens rea*" more often means "the particular mental state element in the definition of the offense."⁴⁶

Thus, when common law commentators spoke of an insane person lacking "*mens rea*" or "lacking intent," they were making the point that the insane person lacked moral culpability for the act; they did *not* typically mean what the Kansas statute has in mind when it allows the mentally ill person to demonstrate that he lacked the *specific* element of "intent" in the definition of the crime. Justice Breyer, in his dissent, makes this very point:

The Court points out . . . that many of the common-law sources state that the insane lack *mens rea* or felonious intent. But what did they mean by that? At common law, the term *mens rea* ordinarily incorporated the notion of "general moral blameworthiness" required for criminal punishment The modern meaning of *mens rea* is narrower and more technical. It refers to the "state of mind . . . that, together with its accompanying conduct, the criminal law defines as an offense."⁴⁷

Therefore, once one understands "*mens rea*" in "culpability" terms, and thus once one sees that it has long been understood that an insane person, *however the word "insane" is defined*, is lacking in moral culpability, it follows that the insanity

⁴⁵ This use of the term "*mens rea*" persists in modern times. *See, e.g.*, *United States v. Micklus*, 581 F.2d 612, 615 (7th Cir. 1978) (when a person acts under duress, this "negates the existence of the requisite *Mens rea* for the crime in question").

⁴⁶ For a fuller explanation of the dual meanings of "*mens rea*"—the culpability and the elemental meanings—*see* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 10.02 (8th ed. 2018) [hereinafter DRESSLER].

⁴⁷ *Kahler*, 140 S. Ct. at 1042 (quoting Frances Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 988 (1932)).

excuse (although perhaps no particular version of the defense) is deeply entrenched. *And, as noted,*⁴⁸ *the majority opinion concedes this!*

So, how can the majority concede this and yet still find that Kansas, which has abolished the insanity defense, is acting constitutionally? The answer lies in this explanation by Justice Kagan:

First, Kansas has an insanity defense negating criminal liability—even though not the type Kahler demands. As noted earlier, Kansas law provides that it is “a defense to a prosecution” that “the defendant, as a result of mental disease or defect, lacked the culpable mental state required” for a crime

Second, and significantly, Kansas permits a defendant to offer whatever mental health evidence he deems relevant at sentencing In other words, any manifestation of mental illness that Kansas’s guilt-phase insanity defense disregards—including the moral incapacity Kahler highlights—can come in later to mitigate culpability and lessen punishment. And that same kind of evidence can persuade a judge to replace any prison term with commitment to a mental health facility. So . . . a defendant arguing moral incapacity may well receive the same treatment in Kansas as in State that would acquit—and, almost certainly, commit—him for that reason [These aspects of Kansas law] *defeat[] Kahler’s charge that the State has “abolish[ed] the insanity defense entirely.”*⁴⁹

Wow. As Professor Orin Kerr has remarked, it is rather odd to say that because a defendant is permitted to introduce mental health evidence in order to negate an element of a crime that this constitutes an insanity defense. His example:

Imagine a defendant is charged with failure to obey a police officer’s order. His defense is that he is deaf and did not hear the order. Under [ordinary] rules of criminal law, the defense is permitted to put on evidence that he is deaf and didn’t hear the order. But we wouldn’t say that the law enacts a “deafness defense.” Instead, we would see that as just the ordinary rules of liability. The government has to prove the elements of the crime beyond a reasonable doubt, and that’s true whether the evidence for or against those elements existing happens to involve mental health evidence (in *Kahler*) or evidence of deafness (in this example).⁵⁰

⁴⁸ See *Kahler supra* note 41 and accompanying text.

⁴⁹ *Kahler*, 140 S. Ct. at 1030–31 (emphasis added).

⁵⁰ Orin S. Kerr, *Due Process and the Criminal Law: A Few Thoughts on Kahler v. Kansas*, VOLOKH CONSPIRACY (Mar. 24, 2020), <https://reason.com/2020/03/24/due-process-and-the-criminal-law-a-few-thoughts-on-kahler-v-kansas/>.

Indeed, to suggest that a defendant who introduces evidence in order to raise a reasonable doubt regarding one of the *prima facie* elements of the crime is thereby raising a “defense” is to blur the distinction between asserting an affirmative defense and merely casting doubt on the government’s case-in-chief. Surely every Justice who signed on to the majority opinion understands this distinction. Did they think they were fooling anyone?

Even more startling is the suggestion that *post-conviction* evidence, which might result in mitigation of punishment or commitment to a mental facility, is a form of “insanity defense.” Justice Breyer has it right when he writes in dissent:

Consider the basic reason that underlies and explains this long legal tradition [of an insanity defense] The tradition reflects the fact that a community’s moral code informs its criminal law. As Henry Hart stated it, the very definition of crime is conduct that merits “a formal and solemn pronouncement of the moral condemnation of the community.”⁵¹

Indeed, allowing a defendant to introduce mental illness evidence at the sentencing phase—*after* the guilty verdict—is too late. As has been said, “[t]he essence of punishment for moral delinquency *lies in the criminal conviction itself*.”⁵² When a person is convicted of a crime, *at that instant*, she is punished because the community (through the jury) has condemned her as a moral wrongdoer. Without an insanity defense—a *true* insanity defense—a person who is not morally responsible for her actions may be convicted of a crime and thus wrongly—*immorally*—stigmatized as a moral delinquent worthy of condemnation by the community and subjected to the collateral consequences of possessing a criminal record.

IV. FURTHER REFLECTIONS AND THOUGHTS ABOUT THE FUTURE

A. *Why I Believe Kagan Was Mostly Wrong*

I said at the start of this essay that I thought the constitutional issue in *Kahler* was a close one but that ultimately Justice Breyer’s dissent is more persuasive. My reasons for siding with the dissent were largely laid out in Part III, but I want to go a bit deeper here.

The majority conceded that for centuries “jurists and judges” have recognized insanity, “however defined,” as “relieving responsibility for a crime.” This is the critical point. This is the question the Court *should* have asked and answered. It *does*

⁵¹ *Kahler*, 140 S. Ct. at 1047 (quoting Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 405 (1958)).

⁵² George K. Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953) (emphasis added).

violate due process to deny a defendant, such as James Kahler, an opportunity to prove that, as a result of mental illness, he should be relieved of responsibility for his actions. The key word here is “responsibility.”

Where the majority goes wrong is by equating a statute that allows Kahler to show that, as a result of a mental disorder, *he did not intend to kill his victims*, with a claim of *non-responsibility* for his actions due to insanity. The former is not an excuse-by-insanity but a failure-of-proof defense, conceptually similar to, for example, a claim of mistake of fact by a perfectly sane hunter who shoots a human being believing it is a deer. That hunter is not claiming he is not responsible for his actions; he is asserting that his mistake negates a charge of intent-to-kill a human being (and on the right facts might even negate a charge of recklessness or negligence).

The point of the insanity defense, as with the common law infancy excuse, is that some people, because of a condition for which they are not responsible—mental illness or age—are not deemed moral agents⁵³ and, therefore, are not morally and legally responsible for their actions. In that absolutely critical sense, Justice Kagan is wrong, therefore, when she concludes that “Kansas’s scheme does not abolish the insanity defense.”⁵⁴ Because Kansas does not provide an affirmative defense of insanity, it *has* abolished the insanity defense. The Court’s version of an “insanity defense” is a *faux* insanity defense. It follows from this that it is even odder for the majority to suggest that an insanity defense exists in Kansas because it permits Kahler *after conviction*—after being deemed responsible for his actions—to try to mitigate his punishment.

So, what should the Court have said? The dissenters got it right. As Breyer wrote, Kansas “eliminated the core of a defense that has existed for centuries: that the defendant, *due to mental illness*, lacked the mental capacity necessary for his conduct to be considered morally blameworthy.”⁵⁵ As he further explained, “[m]atters of degree, specific content, and aptness of application all may be, and have always been, the subject of legal dispute. *But the general purpose—to ensure a rough congruence between the criminal law and widely accepted moral sentiments—persists.*”⁵⁶

Amen to that. Judge Irving Kaufman made the same point years ago when he wrote that “[t]he fact that the law has, for centuries, regarded [insane] wrong-doers

⁵³ There is debate as to whether the *M’Naghten* test is better understood to require proof that, as a result of mental disease or defect, the actor lacked the cognitive *capacity* to know right from wrong or whether it is enough to show that, at the time of the crime, as a result of mental illness, he simply *did not know* that his actions were wrong, i.e., that lack of capacity is required. For an excellent discussion of this and other aspects of the insanity defense, see Stephen P. Garvey, *Insanity*, THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 385–419 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019).

⁵⁴ *Kahler*, 140 S. Ct. at 1031, footnote 6.

⁵⁵ *Id.* at 1038.

⁵⁶ *Id.* at 1047 (emphasis added).

as improper subjects for punishment is a testament to the extent to which that moral sense has developed.”⁵⁷ And, as Judge Thurman Arnold wrote, “[t]o punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be the subject to blame. Our collective conscience does not allow punishment where it cannot impose blame.”⁵⁸

Return to Andrea Yates. She knew that she was killing her children. She had the intent to kill them. But, it would be “undignified and unworthy” to hold her responsible for her actions in view of her deeply mentally disorganized state of mind. And, indeed, despite the awfulness of her actions, a jury *did* rule that she was not responsible for her actions because an insanity defense—the real kind, not the *faux* version—was available to her. If she had committed these acts in Kansas, however, she would have been guilty of four counts of intentional murder. I submit that our collective consciences should reject such an outcome as long as, per Justice Breyer, a “rough congruence between the criminal law and widely accepted moral sentiments [are to persist].”⁵⁹

The majority opinion in *Kahler* expresses a very different sentiment: that persons such as Yates *are* morally responsible for their actions but may avoid the harshest punishments if they can convince the decisionmaker to be merciful or compassionate after conviction. But, the issue here is not one of mercy or compassion, but of justice, as Professor Sanford Kadish has written, “[t]o blame a person is to express a moral criticism, and if the person[] . . . does not deserve criticism, blaming him is a kind of falsehood and is . . . unjust to him.”⁶⁰ A true insanity defense distinguishes between those who are moral agents and those who are not.

It follows from all of this where I stand on the *policy* matter: it should not only be unconstitutional, but wrong as a matter of humane policy to abolish the true insanity defense. All of that said, I do agree with Justice Kagan in one important regard. She wrote:

Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is,

⁵⁷ United States v. Freeman, 357 F.2d 606, 615 (2d Cir. 1966).

⁵⁸ Holloway v. United States, 148 F.2d 665, 666–67 (D.C. Cir. 1945).

⁵⁹ Kahler at 1047.

⁶⁰ Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 264 (1987).

that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve.⁶¹

I tell my Criminal Law students on the first day of class that the course they will be taking asks, as I put it, “the Big Questions—questions about human nature, personal and social responsibility, and ‘right and wrong’—which philosophers, theologians, scientists, and poets, as well as lawyers, have grappled with for centuries.”⁶² And, if this is true, it *does* follow that, in a democracy, it is generally more appropriate to let legislators, *supposedly* the representatives of the community’s values, to craft the contours of an excuse defense than to have a small number of often unelected judges define the excuse.

The dissenters in *Kahler* don’t disagree with this. As they point out, when one looks at all of the definitions of insanity that have been a part of Anglo-American common law for the past three centuries and at post-common law statutes, *M’Naghten* in its various forms merely sets out one standard. There are other tests, including the American Law Institute definition of insanity, the “irresistible impulse” test, and the “product” test.⁶³ Whether the legal definition of insanity test should be as narrow as *M’Naghten*, as broad as the “product” test, or something not yet even adopted,⁶⁴ is a matter for states to determine once it is understood that the Constitution demands that there be some *true* insanity excuse defense.

B. Where Do We Go From Here?

1. The Lingering Eighth Amendment Issue

Although the parties spent significant time in their briefs debating whether abolition of the insanity defense violates the Eighth Amendment ban on cruel and unusual punishment, the Supreme Court did not resolve this issue.

I won’t deal in detail with this question, but it is worth a brief comment. The State of Kansas argued that the scope of the Cruel and Unusual Punishment Clause is limited to forbidding *modes* of punishment considered cruel at the time that the

⁶¹ *Kahler*, 140 S. Ct. at 1037.

⁶² Joshua Dressler & Stephen P. Garvey, *CRIMINAL LAW: CASES AND MATERIALS* viii (8th ed. 2019). As that quote is from the Preface, I make my “Big Questions” speech directly in class (what students ever read a Preface?) and add “just regular people” to the list of those who consider these issues, and expand the time we have been considering these questions to “the beginning of time!” It makes for a great speech, if I do say so myself.

⁶³ For a nice summary of these tests and criticisms leveled against each, see *State v. Johnson*, 121 R.I. 254, 399 A.2d 469 (1979).

⁶⁴ My preferred test is the so-called “justice test” suggested by Judge David Bazelon in *United States v. Brawner*, 471 F.2d 969, 1032 (D.C. Cir. 1972) (“a defendant is not responsible if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act”) (emphasis omitted).

Amendment was adopted, as well as punishment excessive in light of “evolving standards of decency.”⁶⁵ Surely, however, punishment—even one day in jail—is excessive if it is imposed on a person who is morally blameless for his actions because of mental illness. And, as noted before, the very fact that a person is convicted of a crime constitutes punishment in that it falsely stigmatizes the person if he is morally innocent. Professor John Stinneford, in an *amicus* brief in support of neither party, which focused exclusively on the Eighth Amendment question, concluded that:

Abolishing the defense is a dramatic departure that significantly extends the reach of criminal liability—including to those who lack moral culpability, as traditionally conceived. It is likely that the Cruel and Unusual Punishments Clause, if read in light of its history and original meaning, would proscribe Kansas’s outright abolition of the insanity defense.⁶⁶

Although I hold out little hope that the Supreme Court will agree with Professor Stinneford, at least for now it remains unresolved.

2. Can a State Go Further Than Kansas in Limiting Mental Health Testimony?

Supposedly Kansas has an insanity defense because a defendant may introduce mental illness evidence in order to negate the *mens rea* element of an offense and as a post-conviction basis for punishment mitigation and possible removal to a mental institution.

Okay, so what would it take for the Court to reach the conclusion that an “insanity defense,” even as unwisely defined as the Court did in *Kahler*, has truly been abolished and, therefore, violates the Due Process Clause? The Court majority offered no answer to this question. Indeed, it stated that, although Kansas did not abolish the insanity defense, “[w]e say nothing, one way or the other, about whether any other scheme might do so.”⁶⁷ So, let’s look further.

Consider the facts in *Clark v. Arizona*.⁶⁸ Eric Clark, a deeply mentally disturbed person, sought to introduce expert mental health evidence to show that when he killed a police officer he believed he was killing an alien from outer space and, therefore, lacked the intent to kill a police officer, the *mens rea* element of the offense charged. Arizona, unlike Kansas, did not allow him to introduce such *mens*

⁶⁵ Respondent’s Brief, *supra* note 2, at 47 (quoting *Miller v. Alabama*, 567 U.S. 460, 470 (2012)).

⁶⁶ Brief for Professor John F. Stinneford as Amicus Curiae Supporting Neither Party, at *28–29, *Kahler v. Kansas*, 410 P.3d 105 (2018) (No. 18-6135) (filed June 7, 2019).

⁶⁷ *Kahler*, 140 S. Ct. at 1031, n.6.

⁶⁸ 548 U.S. 735 (2006).

rea testimony. Instead, again unlike Kansas, Arizona permitted Clark to introduce this testimony to prove he was legally insane under that state's version of the *M'Naghten* test.⁶⁹ The Supreme Court upheld Arizona's system against constitutional attack.⁷⁰ In other words, the Arizona scheme, essentially the converse of Kansas's, is similarly constitutional. So: *mens rea* psychiatric defense + post-conviction psychiatric mitigation + no insanity defense = constitutional (*Kahler*); and no *mens rea* psychiatric defense + an insanity defense = constitutional (*Clark*).

It seems reasonable to believe that if a state does not permit mental health evidence for *any* purpose—to negate *mens rea*, serve as an affirmative defense, or as a sentencing mitigator—this would go too far. What if, however, a state (say, Arizona) abolishes *both* psychiatric *mens rea* testimony (as Arizona did) *and* the traditional insanity defense (as Kansas did), but allows (as in Kansas), the now convicted defendant (Eric Clark) the opportunity to introduce evidence of his long-term mental illness as a potential basis for reduction in his punishment? Obviously, in light of my previous comments, I would consider this approach unconstitutional and awful policy, but would the Supreme Court? In other words, how important to the Court's ruling was Kansas's sentencing-phase provisions?

Although Justice Kagan listed this aspect of Kansas law as her second reason for the Court's there-is-an-insanity-defense finding, she described it as “second, *and significantly*.”⁷¹ She also made a point of the fact that under Kansas law, beyond punishment reduction, a judge has authority to “replace any prison term with commitment to a mental health facility,”⁷² and thus place the convicted party where a person found not guilty by reason of insanity would find himself, namely, in a mental health institution.

Perhaps this latter aspect of Kansas law might be deemed constitutionally satisfactory to the personnel on this Court. If we are going to hypothetically suggest that an “insanity defense” may be based *exclusively* on the introduction of post-conviction psychiatric testimony, it is easier to pretend that a “defense” exists if the statutory scheme allows a convicted murderer to introduce psychiatric evidence in order to be committed to a mental health facility than one that only permits, for example, a murderer, to have his sentence mitigated from life imprisonment to a sentence of years.

Constitutional issues aside, it is interesting to speculate whether the Arizona or Kansas system is better or, as I would put it, less bad. Consider Eric Clark, who was convicted in Arizona. He would have preferred the Kansas approach. If a jury believed his testimony that he did not know he was killing a police officer—indeed,

⁶⁹ ARIZ. REV. STAT. ANN. § 13-502(A) (2009) (“A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.”).

⁷⁰ *Clark*, 548 U.S. at 770–71.

⁷¹ *Kahler* at 1031 (emphasis added).

⁷² *Id.*

if his testimony created a reasonable doubt as to this fact—the jury would have been required to acquit him. He didn’t even need a true insanity defense. But, what about Andrea Yates? She would have preferred Arizona. She intended to kill her four children, so what she needed was an opportunity to claim insanity, which would have been denied to her in Kansas.

A policy question, however, should not be resolved by deciding which defendant is happier, but rather on the basis of which outcome is better from a moral and public safety perspective. From the public safety perspective, the Kansas system would potentially allow a dangerous and mentally ill person, but one who did not form the requisite intent (e.g., Clark) to be acquitted and released back to the streets.⁷³ This would also be a bad long-term outcome for someone like Clark, who needed psychiatric help, even if it had to be imposed involuntarily. From a moral perspective, therefore, I would submit Arizona’s system is less bad because, by retaining an insanity defense, a person such as Eric Clark or Andrea Yates can potentially avoid a finding of moral responsibility and obtain needed mental health care.

3. What Does *Kahler* Tell Us About Other Excuses?

In light of *Kahler*, may a state now abolish other excuse defenses without violating the Due Process Clause? Justice Breyer expressed “doubt . . . that a State may do away with the defenses of duress or self-defense on that ground that, in its idiosyncratic judgment, they are not required.”⁷⁴

I don’t think we need to worry that any state would abolish the justification defense of self-defense, but what about excuse defenses, such as duress? A person who commits arson, for example, because she or a loved one is threatened with imminent death if she does not commit the crime, possesses the *mens rea* of that offense, so she would be convicted of arson if she were denied the duress defense. That should not be permitted. The underlying rationale of the defense is that a

person acting under duress is excused, although [s]he possessed the capacity to make the right choice, if [s]he lacked a fair opportunity to act lawfully or, slightly more accurately, if [s]he lacked a fair opportunity to avoid acting unlawfully

At its core, the defense of duress requires us to determine what conduct we, a society of individual members of the human race, may legitimately expect of our fellow threatened humans.⁷⁵

⁷³ He might be civilly committed at some later time.

⁷⁴ *Kahler*, 140 S. Ct. at 1047.

⁷⁵ Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1365–66 (1989).

In other words, “there but for the grace of God go I.” How can it be morally right to blame and punish someone who twelve jurors would conclude is no different than they are: a normal person, but not a hero?

So, does this mean that abolition of the duress defense, although morally obtuse, is unconstitutional? Perhaps not. The common law did not recognize the duress excuse in murder prosecutions, and most states still do not recognize it in such circumstances,⁷⁶ so it lacks the historical pedigree of the insanity defense. Perhaps this excuse could be abolished for all crimes, particularly if a state permits the defendant to argue for mitigation during sentencing. However, as the duress defense, by its nature, is pled by “normal” people—people like us, rather than “those crazy people”—it is unlikely a legislature would find it as politically expedient to abolish the duress defense as the insanity defense.

IV. CONCLUSION

The *Kahler* opinion could have been worse. That is the best that I can say for it. We now must wait to see whether legislatures that retain a true insanity defense will use this case as an opportunity to repeal it, and whether they will push the envelope further to see how far they may constitutionally go to bar mental health testimony. For those of us who believe that a full-throated insanity defense is wise policy, however, we cannot rely on the United States Supreme Court to protect the penal interests of the mentally ill.

⁷⁶ DRESSLER, *supra* note 46 at § 23.04[A].